UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 19, 2012

CBCA 2770

EAGLE PEAK ROCK & PAVING, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Michael W. Jansen of Law Offices of Michael W. Jansen, Woodland, CA, counsel for Appellant.

Carolyn A. Lown, Office of the Solicitor, Department of the Interior, San Francisco, CA, counsel for Respondent.

Before Board Judges **BORWICK**, **SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge.

Appellant, Eagle Peak Rock & Paving, Inc. (Eagle Peak), is a subcontractor which furnished supplies used in the performance of a prime contract between the Department of the Interior, National Park Service (NPS), and Sunland Industries, LLC (Sunland). Eagle Peak, alleging that Sunland did not pay it for the supplies it provided, now seeks compensation directly from NPS under the theory that Eagle Peak is a third-party beneficiary of the contract between NPS and Sunland.

Briefing was required from the parties on the issue of whether the Civilian Board of Contract Appeals (CBCA) has jurisdiction to decide this matter. The appellant took the position that the CBCA has jurisdiction to hear the appeal, while the respondent argued that the CBCA lacks jurisdiction.

Background

In September 2009, NPS and Sunland entered into contract P8410090037 for the supply of 9700 tons of gravel to be used by NPS employees on roads within the Lava Beds National Monument, California. Sunland subsequently contracted with Eagle Peak, an aggregate rock supplier, to provide the gravel. The gravel was delivered and NPS paid Sunland for the gravel.

On October 13, 2011, alleging that Sunland failed to pay it for the gravel it delivered, Eagle Peak sought $233,650.38 directly from NPS. While styled as "Contractor's Claim Against the United States of America," the document did not indicate the statutory authority under which the claim was brought. The NPS contracting officer treated the matter as a claim brought pursuant to Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (Supp. IV 2011), and on December 15, 2011, denied the claim in total, asserting that Eagle Peak was not a party to the contract between NPS and Sunland.[1]

Discussion

It undisputed that NPS had an express contract with Sunland to provide gravel and that Eagle Peak supplied the gravel. Sunland was fully paid by NPS and it released NPS from any further obligation under the express contract.

The Board's jurisdiction is derived from the CDA, which is a waiver of sovereign immunity that must be strictly construed. *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). The CDA permits a "contractor" to appeal a contracting officer's decision to the appropriate board of contract appeals. 41 U.S.C. § 7104. The term "contractor" is defined as "a party to a Federal Government contract other than the Federal Government." 41 U.S.C. § 7101(7).

The Court of Appeals for the Federal Circuit, our appellate authority, has held that the waiver of sovereign immunity contained in the CDA must be strictly construed in favor of the sovereign. *Winter v. Floorpro*, *Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009). Consequently, "those who are not in privity of contract with the government cannot avail themselves of the CDA's appeal provisions." *Id*. at 1370.

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[1] It also appears that the document did not contain the certification language required by the CDA for claims over $100,000. 41 U.S.C. § 7103(b).

The requisite privity of contract needed to permit an appeal under the CDA has generally been limited to prime contractors who have actually contracted with the Government. Attempts by other parties, such as subcontractors and sureties, to extend the concept of privity beyond the prime contractor have typically been rejected. *See Floorpro*, 570 F.3d at 1372-73; *Admiralty Construction, Inc. v. Dalton*, 156 F.3d 1217, 1220-21 (Fed. Cir. 1998); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983); *Cosmic Construction*, 697 F.2d at 1390; *Wackenhut International, Inc. v. Department of State*, CBCA 1235, 09-2 BCA ¶ 34,255; *Edward W. Scott Electric Co. v. Department of Veterans Affairs*, CBCA 1388, 09-2 BCA ¶ 34,181.

Eagle Peak argues that exceptions exist to the rule requiring privity of contract in appeals made pursuant to the CDA for situations "where a third-party beneficiary theory can be proven or when there is an implied contract." While Eagle Peak has not alleged that it had an implied-in-fact contract with NPS, Eagle Peak has alleged third-party beneficiary status in the NPS contract. The citations *Eagle Peak* references for the proposition that it should be allowed to bring this action as a third-party beneficiary are inapplicable here because those cases were brought pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) (2006). As noted in *Floorpro*, the Tucker Act has a broader grant of jurisdiction than the CDA. 570 F.3d at 1372. According to the Federal Circuit in *Floorpro*, "the Tucker Act's privity requirement is separate and distinct from the CDA's statutory requirement that only 'contractors' may appeal to agency boards of contract appeals," and therefore, the "third-party beneficiary subcontractor" was not a "contractor" within the meaning of the CDA. *Id*. at 1372-73.

Eagle Peak was not a "contractor" within the meaning of the CDA in the contract NPS had with Sunland. As such, we have no jurisdiction to address this matter.

Decision

CBCA 2770 is **DISMISSED FOR LACK OF JURISDICTION**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

JONATHAN D. ZISCHKAU
Board Judge